

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

ROSIE ZAMORA AND MARCO
ZAMORA, §
§
Plaintiffs, §
v. § CIVIL ACTION NO. 4:16-cv-00170-ALM
§
RYLAND MORTGAGE COMPANY, §
BANK OF AMERICA, HOUSING & §
URBAN DEVELOPMENT, AND §
CALIBER HOME LOANS, INC., §
§
Defendants. §

**CALIBER HOME LOANS, INC.'S
MOTION TO DISMISS UNDER RULE 41(b)**

Plaintiffs Rosie Zamora and Marco Zamora's ("Zamoras") entire suit should be dismissed with prejudice as Zamoras failed to prosecute this action and failed to comply with the rules and court orders.

I. Factual and Procedural Background

1. Zamoras filed this action on November 2, 2015, in the 199th Judicial District Court, Collin County, Texas.¹ The suit is against Caliber Home Loans, Inc. ("Caliber") and three other defendants, Ryland Mortgage Company, Bank of America, and the Department of Housing and Urban Development, alleging wrongful foreclosure and violation under the CFPB "early intervention" rule. Zamoras also applied for a temporary restraining order and temporary injunction, and demanded for accounting.²

¹ See Complaint [Doc. 1-6].

² *Id.*

2. The state court docket sheet shows that Zamoras did not request issuance of citations and therefore, did not serve any defendants with citation.³ Additionally, Zamoras also failed to appear at the temporary restraining order hearing set for November 16, 2015.⁴

3. On February 25, 2016, Caliber filed its Original Answer in the state court.⁵

4. On March 8, 2016, Caliber removed the suit to this Court based on diversity jurisdiction.⁶

5. On March 14, 2016, this Court entered an Order and Advisory, ordering Zamoras to amend their complaint to comply with the federal court pleading standard. Zamoras were ordered to amend by April 13, 2016.⁷

6. Zamoras have not amended their Complaint as ordered.

7. On May 13, 2016, this Court entered an Order Governing Proceedings.⁸ It required the parties to: (i) conduct a Rule 26(f) conference by June 3, 2016; (ii) complete initial mandatory disclosure by June 13, 2016; (iii) file a joint report of the conference by June 17, 2016; and (iv) appear for a case management conference on July 1, 2016.⁹

8. On June 13, 2016, Caliber filed a Notice of Initial Disclosure after it served Zamoras the mandatory initial disclosure.¹⁰

9. On June 17, 2016, Caliber filed a unilateral Report of Rule 26(f) Meeting because the Zamoras failed to communicate after Caliber's attempts to make contact.¹¹

³ See Docket Sheet [Doc. 1-5].

⁴ *Id.*

⁵ Caliber's Original Answer [Doc. 1-9].

⁶ Notice of Removal [Doc. 1].

⁷ Order and Advisory [Doc. 5]

⁸ Order Governing Proceeding [Doc. 6]

⁹ *Id.*

¹⁰ Caliber's Notice of Initial Disclosure [Doc. 7]

¹¹ Caliber's Rule 26(f) Report [Doc. 9].

10. On June 23, 2016, this Court cancelled the Rule 16 management conference set for July 1, 2016.¹²

11. On July 12, 2016, this Court ordered a telephonic status conference for July 29, 2016.¹³

12. Zamoras failed to appear at the July 29, 2016, telephonic status conference.

13. Zamoras have remained inactive throughout the suit.

14. In contrast, Caliber has complied with the federal rules and this Court's orders.

II. Argument

15. A court may dismiss a plaintiff's suit for failure to prosecute and will be reversed only for an abuse of discretion.¹⁴ The 5th Circuit has consistently held that Rule 41(b) dismissals are appropriate upon a showing of a "clear record of delay or contumacious conduct by the plaintiff, and where lesser sanctions would not serve the best interest of justice."¹⁵

16. This Court should dismiss Zamoras' suit because they have wholly failed to prosecute this case.¹⁶ Specifically, Zamora's suit should be dismissed for the following clear record of delay and contumacious conduct:

- a. Zamoras failed to serve any defendants with citations of the suit;
- b. Zamoras failed to amend their complaint as ordered by the court;
- c. Zamoras failed to communicate and complete the Rule 26(f) conference as ordered by the Court;
- d. Zamoras failed to serve the initial mandatory disclosure as ordered by the Court;

¹² Order [Doc. 10].

¹³ Order Setting Telephonic Status Conference [Doc. 11].

¹⁴ *Link v. Wabash, R.R.*, 370 U.S. 626, 633, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1961); *Salinas v. Sun Oil Co.*, 819 F.2d 105, 106 (5th Cir.1987); *Martin-Trigona v. Morris*, 627 F.2d 680, 682 (5th Cir.1980); Fed. R. Civ. P. 41(b).

¹⁵ *Salinas* at 106.

¹⁶ *Dorsey v. Scott Wetzel Servs., Inc.*, 84 F.3d 170, 171-72 (5th Cir. 1996) (failure to comply with orders and settings).

- e. Zamoras failed to file a joint report of the Rule 26(f) conference as ordered by the Court; and
- f. Zamoras failed to attend the telephonic status conference ordered by the Court.

17. Because the Zamoras have demonstrated a pattern of non-compliance with the Court's orders and they failed to prosecute this case, Caliber requests that the Zamoras' suit be dismissed with prejudice under Rule 41(b).

Conclusion and Prayer

Zamoras' failure to actively pursue the lawsuits they filed against Caliber appears to simply be a bad faith attempt to tie Caliber down with a baseless lawsuit. Zamoras' blatant disregard of the Court's order interferes with the Court's ability to manage its docket. Dismissal of Zamoras' suit is the only effective sanction available because Zamoras displayed utter disregard for the judicial system, the Court's order, and the rights of Caliber. For these reasons, Caliber asks the Court to grant this Motion to Dismiss under Rule 41(b), dismiss with prejudice Zamoras' claims against Caliber, and grant Caliber such further relief to which it is entitled.

Respectfully submitted,

/s/ Amy S. Ooi

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Certificate of Service

I certify that this document was served in accordance with the Federal Rules of Civil Procedure on August 10, 2016, by the manner indicated upon the following persons:

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/s/ Amy S. Ooi

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